

1988

South Sanpitch Company v. Daniel Pack, Margaret A. Gunterman, Action Title Company, T.P. Family Partnership, Hoffbuher Redi* Mix Inc., Willard M. Tucker, Phyllis O. Tucker, and D Land Title Company: Brief of Respondent

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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880025-CA

DOCKET NO. SOUTH SANPITCH COMPANY,

Plaintiff-Appellant,

-vs-

DANIEL PACK; MARGARET A.
GUNTERMAN; ACTION TITLE COMPANY,
TRUSTEE; T. P. FAMILY PARTNER-
SHIP; HOFFBUHER REDI-MIX INC.;
WILLARD M. TUCKER; PHYLLIS O.
TUCKER; D LAND TITLE COMPANY;
and all unknown persons who
have or claim any right, title
estate, lien or interest in
the subject property,

Defendants-Respondent.

D LAND TITLE COMPANY,

Third-Party Plaintiff,

-vs-

NORMA S. WANLASS,

Third-Party Defendant.

* * * * *

BRIEF OF RESPONDENT D LAND TITLE COMPANY

* * * * *

Appeal from the Sixth Judicial District Court of
Sanpete County, State of Utah
Honorable Don V. Tibbs, District Judge

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88-0025-CA

CASE NO. 860239

Category No. 13 b

FILED

SEP 5 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

SOUTH SANPITCH COMPANY,)

Plaintiff-Appellant,)

-vs-)

DANIEL PACK; MARGARET A.)

GUNTERMAN; ACTION TITLE COMPANY,)

TRUSTEE; T. P. FAMILY PARTNER-)

SHIP; HOFFBUHER REDI-MIX INC.;)

WILLARD M. TUCKER; PHYLLIS O.)

TUCKER; D LAND TITLE COMPANY;)

and all unknown persons who)

have or claim any right, title)

estate, lien or interest in)

the subject property,)

Defendants-Respondent.)

CASE NO. 860239

Category No. 13 b

D LAND TITLE COMPANY,)

Third-Party Plaintiff,)

-vs-)

NORMA S. WANLASS,)

Third-Party Defendant.)

* * * * *

BRIEF OF RESPONDENT D LAND TITLE COMPANY

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

SOUTH SANPITCH COMPANY,)
)
Plaintiff-)
Appellant,)
)
-vs-)
)
DANIEL PACK; MARGARET A.)
GUNTERMAN; ACTION TITLE COMPANY,))
TRUSTEE; T. P. FAMILY PARTNER-)
SHIP; HOFFBUHER REDI-MIX INC.;)
WILLARD M. TUCKER; PHYLLIS O.)
TUCKER; D LAND TITLE COMPANY;)
and all unknown persons who)
have or claim any right, title)
estate, lien or interest in)
the subject property,)
)
Defendants-)
Respondents.)
)

D LAND TITLE COMPANY,)
)
Third-Party)
Plaintiff,)
)
-vs-)
)
NORMA S. WANLASS,)
)
Third-Party)
Defendant.)

CASE NO. 860239

* * * * *

STATEMENT OF ISSUES PRESENTED ON APPEAL

Whether or not the District Court erred in ruling that an assignment of a beneficial interest in a Deed of Trust did not constitute a conveyance of real property.

STATEMENT OF FACTS

On the 18th day of May, 1977, Appellant South Sanpitch Company, entered into a Uniform Real Estate Contract with

Hoffbuher Redi-Mix, Inc., (hereinafter "Redi-Mix") for the purchase of ten (10) acres of unimproved real property, which ten acres is the subject matter of this lawsuit. (Ex. 4) Said Uniform Real Estate Contract was not recorded nor was any notice of contract recorded with respect thereto.

Redi-Mix thereafter executed and recorded a Quitclaim Deed dated the 12th day of November, 1980 to T. P. Family Partnership, a Utah limited partnership, conveying 6,696.85 acres included in which was the subject 10 acres being purchased by South Sanpitch (Ex. 1).

On or about the 28th day of August, 1981, T. P. Family Partnership executed and recorded a Deed of Trust to D Land Title as Trustee and Margaret A. Gunterman as Beneficiary, encumbering 220 acres and which included the subject ten acres (Ex. 3).

After all payments were satisfied with respect to the Uniform Real Estate Contract between South Sanpitch and Redi-Mix, South Sanpitch sought and eventually obtained from Gunterman a request for a partial reconveyance on the subject ten acres.

Pursuant to Gunterman's request, a Deed of Partial Reconveyance was executed by D Land Title as Trustee on December 16, 1983. (Ex. 5)

Following the execution of said Deed of Partial Reconveyance but prior to its recording, Gunterman executed and recorded an assignment to Daniel Pack of her beneficial interest in the Trust Deed from T. P. Family Partnership as Grantor (Ex. 2).

The Deed of Partial Reconveyance was recorded on May 29, 1984. (Ex. 5)

Approximately one year later, on April 2, 1985, South Sanpitch commenced this action believing it necessary to quiet title to the subject ten acres due to the execution and recordation of the Assignment of the Promissory Note secured by the Deed of Trust prior to the recording of the Deed of Partial Reconveyance.

South Sanpitch, prior to trial and without hearing, obtained the relief sought in their Complaint in that they obtained an order quieting title to the subject ten acres through stipulations with all necessary Defendants. The Complaint was pursued to trial as to Respondent D Land Title Company, merely for the purpose of obtaining attorneys fees as a form of damages.

SUMMARY OF ARGUMENT

The District Court properly found that South Sanpitch was not damaged despite the fact that the Deed of Partial Reconveyance was not timely recorded because said Deed of Partial Reconveyance, when recorded, transferred legal title to the subject ten acres and released all other interests in and to the same.

The assignment by Margaret A. Gunterman of her note and beneficial interest in the Deed of Trust did not constitute a conveyance of real property. The Trustee's legal title in the property was not changed or reduced because of such assignment.

ARGUMENT

POINT I

AN ASSIGNMENT OF A BENEFICIAL INTEREST IN A DEED OF TRUST IS NOT A CONVEYANCE OF REAL PROPERTY.

In August, 1981 T. P. Family Partnership conveyed to D Land Title as Trustee all its right, title and interest in and to the subject ten acres. Had there been a Trustee's Sale pursuant to a foreclosure of the Deed of Trust, the Trustee would have conveyed to the purchaser at such Trustee's Sale the same right, title and interest which had vested in the Trustee at the time of the original conveyance by T. P. Family Partnership to D Land Title as Trustee, subject only to the liens and encumbrances of record affecting the property at the time of the original conveyance to the Trustee.

Section 57-1-28(2) Utah Code Annotated, 1953, as amended states that:

The Trustee's Deed shall operate to convey to the purchaser, without right of redemption, the Trustee's title and all right, title, interest and claim of the Trustor and his successors in interest and of all persons claiming by, through, or under them in and to the property sold, including all such right, title, interest and claim in and to such property acquired by the Trustor or his successors in trust subsequent to the execution of the Trust Deed. (Emphasis added)

The title vested in a Trustee of a Deed of Trust is determined by the title and interest of the Trustor and his successors in interest or persons claiming by or through Trustor or his successors and is not affected by the acts of the beneficiary to such Deed of Trust.

The assignment of a beneficial interest in a Deed of Trust is not an encumbrance. The Deed of Trust is itself an encumbrance and the acts of the beneficiary of such Deed of Trust does not create a separate encumbrance or a lien which would in any way affect the title held by the Trustee.

Assuming that the trust property had been sold at a Trustee's Sale, the purchase at such sale would not have been subject to the beneficiary's assignment of her interest in the Deed of Trust because such assignment did not represent an encumbrance or a lien. Even if the assignment were deemed to be a properly recorded lien, it was not recorded before the Deed of Trust itself and thus it would be inferior to the title held by the Trustee and eliminated at the time of the Trustee's Sale.

* * *The *cestui que trust* or beneficiary in a Deed of Trust given as security for a debt has no title to, or estate in, the property covered by the deed or at least he has no legal title or ownership and it has been held that he has no equitable title,* * * He has only a lien or a secured chose in action, and he has an interest only to the extent that he can cause the Trustee to sell the land and apply the proceeds to payment of the secured debt. Such interest is personal property. 59 C.J.S. Mortgages, §196, pgs. 257-258.

No disposition of the beneficial interest of the Trust Deed could affect title to the property and title to the property remained in the Trustee under said Trust Deed.

POINT II

THE UTAH RECORDING STATUTE DOES NOT APPLY TO THIS CASE BECAUSE IT AFFORDS PROTECTION ONLY TO SUBSEQUENT PURCHASERS OF REAL PROPERTY WITHOUT NOTICE.

Appellant argues that under the recording statute Pack

as assignee of an obligation secured by the Deed of Trust in question was not affected or bound by the subsequently-recorded partial reconveyance because he was a purchaser in good faith for value without notice of the partial reconveyance. Section 57-3-3, Utah Code Annotated, 1953, as amended, is cited as authority for this position. However, upon closer examination of the statute it is clear that protection from unrecorded instruments is only afforded purchasers of the real property involved. Section 57-3-3 reads:

Every conveyance of real estate hereafter made, which shall be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith and for valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.
(Emphasis added)

Section 57-3-3 does not apply because Pack was not a purchaser of real estate but was merely the purchaser of an obligation secured by the Deed of Trust in question and the assignee of the beneficial interest therein; the interest acquired being an interest in personal property only. 59 C.J.S. Mortgages, §196, supra.

CONCLUSION

This Court did not err in finding that the Appellant was not damaged by the untimely recording of the partial reconveyance because the prior recorded assignment of beneficial interest did not constitute a conveyance of real property or an encumbrance affecting title. Title remained in the name of the Trustee unaffected by said assignment of the beneficial interest in the Deed of Trust.


Therefore, Respondent respectfully requests that the Court affirm the judgment of the Lower Court.

DATED this 5th day of September, 1986.

Respectfully submitted,

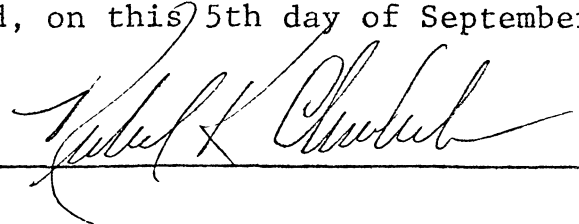
OLSEN AND CHAMBERLAIN

By


Richard K. Chamberlain

ACKNOWLEDGMENT OF SERVICE

I hereby certify that four (4) copies of the foregoing Brief of Respondent were mailed to Messrs. Brent D. Young and Jerry L. Reynolds, Ivie & Young, Attorneys for Appellant, 48 North University Avenue, P.O. Box 672, Provo, Utah (84603), by U.S. Regular Mail, postage prepaid, on this 5th day of September, 1986.



57-1-28. Sale of trust property by trustee — Payment of bid — Trustee's deed delivered to purchaser — Recitals — Effect. (1) The purchaser at the sale shall ~~[forthwith]~~ pay the price bid as directed by the trustee and upon receipt of payment, the trustee shall execute and deliver his deed to such purchaser. The trustee's deed may contain recitals of compliance with the requirements of ~~[this act]~~ Sections 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described therein, including recitals concerning any mailing, personal delivery, and publication of the notice of default, any mailing and the publication and posting of the notice of sale, and the conduct of sale~~;~~ and such. These recitals [shall] constitute prima-facie evidence of such compliance and are conclusive evidence ~~[thereof]~~ in favor of bona fide purchasers and encumbrancers for value and without notice.

(2) The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest, and claim of the trustor and his successors in interest and of all persons claiming by, through, or under them, in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the trustor or his successors in interest subsequent to the execution of the trust deed.

History: L. 1961, ch. 181, § 10; 1985, ch. 68, § 2.

57-1-29. Proceeds of trustee's sale — Disposition.

Duties of trustee.

A trustee under trust deed has an affirmative duty to uphold his statutory responsibilities, and may not ignore those

responsibilities in order to assist certain interest holders at the expense of others. *Randall v. Valley Title* (1984) 681 P 2d 219.

57-1-31. Trust deeds — Default in performance of obligations secured — Reinstatement — Cancellation of recorded notice of default. (1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of ~~[such]~~ the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of such obligation or of such trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under such trust deed, if the power of sale is to be exercised, ~~[or, otherwise at any time prior to the entry of the decree of foreclosure,]~~ may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust deed ~~[and the obligation secured thereby]~~ (including costs and expenses actually incurred in enforcing the terms of such obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than such portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(2) If the default is cured and the trust deed reinstated in the manner ~~[hereinafter]~~ provided in Subsection (1), the beneficiary, or his assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him

Omission of amount of debt in mortgage or in record thereof (including general description without stating amount) as affecting validity of mortgage, its operation as notice, or its coverage with respect to debts secured, 145 A. L. R. 369.

Record as charging one with constructive notice of provisions of extrinsic instrument referred to in the recorded instrument, 82 A. L. R. 412.

Record of deed or contract for conveyance of one parcel with covenant or easement affecting another parcel owned by grantor as constructive notice to subsequent purchaser or encumbrancer of latter parcel, 16 A. L. R. 1013.

Record of deed to cotenant as notice to other cotenants of adverse character of grantee's possession, 82 A. L. R. 2d 5.

Record of instrument which comprises or includes an interest or right that is not a proper subject of record, 3 A. L. R. 2d 577.

Record of instrument without acknowledgment or insufficiently acknowledged as notice, 59 A. L. R. 2d 1299.

Rights as between purchaser of timber under unrecorded instrument and subsequent vendee of land, 18 A. L. R. 2d 1162.

57-3-3. Effect of failure to record.—Every conveyance of real estate hereafter made, which shall not be recorded as provided in this title shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof where his own conveyance shall be first duly recorded.

History: R. S. 1898 & C. L. 1907, § 2001; C. L. 1917, § 4901; R. S. 1933 & C. 1943, 78-3-3.

Effect of failure to record.

Where, after mortgage was executed on certain tract of land, owner executed deed to grantee on property not included in mortgage, which deed was not recorded, decree in action to foreclose mortgage on tract of land, including part conveyed to grantee, was not binding on grantee who was not party to such action. Federal Land Bank of Berkeley v. Pace, 87 U. 156, 48 P. 2d 480, 102 A. L. R. 819.

A judgment lien is subordinate and inferior to a deed which predated it whether recorded after such judgment or whether not recorded at all. Kartchner v. State Tax Comm., 4 U. (2d) 352, 294 P. 2d 790.

Priority.

Innocent purchaser for value without notice of previous conveyance, who first records his conveyance, takes preference over prior unrecorded conveyance. McGarry v. Thompson, 114 U. 442, 201 P. 2d 288, involving priority as between assignments of application to appropriate unappropriated public water under 73-3-18, citing Wells, Fargo & Co. v. Smith, 2 U. 39, affd. 104 U. S. 428, 26 L. Ed. 802.

Later in time but prior recorded first mortgage took precedence over purchase money mortgage where mortgagee had no notice of the purchase money mortgage. Kemp v. Zions First Nat. Bank, 24 U. (2d) 288, 470 P. 2d 390.

Words and phrases defined.

This section does not define what is meant by the word "recorded." Boyer v. Pahvant Mercantile & Investment Co., 70 U. 1, 287 P. 188.

Mortgage lien is included in term "conveyance" as used in this section, mortgagee is purchaser, and law of priority of record applies to mortgages. Federal Land Bank of Berkeley v. Pace, 87 U. 156, 4 P. 2d 480, 102 A. L. R. 819.

Collateral References.

Vendor and Purchaser—233.

92 C.J.S. Vendor and Purchaser § 345.

Failure to record, 66 Am. Jur. 2d 437 et seq., Records and Recording Laws § 15 et seq.

Agreement between real estate owner restricting use of property as within contemplation of recording laws, 4 A. L. R. 2d 1419.

Presumption and burden of proof as regards good faith and consideration of part of purchaser or one taking encumbrance subsequent to unrecorded conveyance or encumbrance, 107 A. L. R. 502.

Purchase-money mortgage as within provision of statute defeating or postponing lien of unrecorded or unfiled mortgage, 137 A. L. R. 571, 168 A. L. R. 1164.

Right of one otherwise protected by recording law against prior unrecorded deed or mortgage as affected by fact that all or part of the consideration was unpaid at the time he received notice, actual or constructive, of the prior instrument, 10 A. L. R. 163.